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No. 01-1479

IN THE

Supreme Court of the United States

GENERAL MOTORS CORPORATION,

Petitioner,

v.

PAMELA R. GOODWIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States ("the Chamber") moves for leave to file a brief *amicus curiae* in support of Petitioner. That brief is attached. The Chamber is filing this motion because Respondent has refused to consent to the filing of this brief. In further support of this Motion, the Chamber states:

1. The Chamber is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members in important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests, *inter alia*, by filing briefs in hundreds of cases of significance in this Court and in the courts of appeals.

2. This case involves the administration of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*, to which the vast majority of the business that belong to the Chamber are subject. The decision below both exemplifies and exacerbates a profound division of authority in the courts of appeals on two questions regarding the application of Title VII's statute of limitations. These conflicts create confusion, uncertainty, and unnecessary litigation expense for both employers and employees alike.

3. The court below held that an aggrieved individual need not challenge a decision regarding his or her compensation within the limitations period specified in the statute — indeed is entitled to wait years or decades to challenge such an allegedly discriminatory decision — so

long as the economic consequences of that decision continue into the limitations period. This rule cannot be reconciled with the Court's decision in *United Air Lines v. Evans*, 431 U.S. 553 (1977), and it undermines the societal interest in repose that is reflected by Congress' choice of a brief limitations period for charges of discrimination. As the Court has previously observed, consistency and clarity in the law are uniquely important with regard to statutes of limitation. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). The law on this issue is in complete disarray and will not be clarified unless and until the Court agrees to do so.

4. The decision below also chooses sides in a three-way split of circuit authority regarding the remedial latitude of district courts in awarding back pay to successful Title VII plaintiffs. Some courts have held that a district court can award back pay for a period extending no further than the charge filing limitations period — at most 300 days prior to the date of the charge. Others hold that the district court can reach back as much as two years before the charge is filed. Still others will permit a two year award but only when a "continuing violation" has been shown. These doctrinal differences lead to vastly different awards for materially identical claims, depending on the geographic locale of the litigation.

5. These persisting conflicts on important matters of federal law are particularly problematic for Chamber members that do business in multiple states, and for those that do business in every state. More than anything else, the Chamber's members seek a single, clear, and reliable rule of law, applicable to all of its members and all of their employees. The Chamber asks for permission to participate so that it might explain to the Court the difficulties the rules adopted by the court below impose on its members.

Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the attached brief.

Respectfully submitted,

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INTERESTS OF THE *AMICUS CURIAE*

The interests of the Chamber of Commerce of the United States ("the Chamber") are fully described in the accompanying Motion for Leave to File Brief *Amicus Curiae*. In the interest of brevity, those matters will not be repeated here.[1]

STATEMENT

1. Respondent Pamela Goodwin was hired by Petitioner General Motors Corp. ("GM") in 1976. Pet. App. 22a. Her career at GM followed a fitful path of promotions, demotions, layoffs and recalls. She was promoted in 1978, laid off in 1980, and recalled to a job in a lower salary grade later that same year. *Id.* at 22a-23a. Goodwin was laid off again in 1982 and recalled in 1983. In the mid-1980s, she was denied a promotion because GM planned to close the plant where she worked. *Id.* at 23a. Goodwin was laid off when the plant closed in 1987. *Id.*

Goodwin transferred to a temporary position at a different GM facility later in 1987. *Id.* She obtained a full-time position shortly thereafter, and was promoted in 1989. *Id.* In 1991, GM promoted Goodwin to labor relations representative; at the time of this promotion, Goodwin earned less in the job than three other employees already working as labor relations representatives at the facility. *Id.* at 24a. Over the ensuing seven years, Goodwin received pay raises comparable to those received by her peers, but the differential remained. *Id.* at 14a n.10.

Goodwin filed a charge of race discrimination in 1998. *Id.* at 6a. In her charge, Goodwin challenged recall and promotion decisions occurring over an eighteen-year period. *None* of the promotion, demotion, compensation or recall decisions she challenged was made within Title VII's charge-filing limitations period. *Id.* at 29a, 32a. Goodwin subsequently filed suit in federal district court in the District of Kansas.

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1. Counsel for *amicus curiae* authored the brief in its entirety. No person or entity, other than the *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

2. The district court granted GM's motion for summary judgment, concluding that Goodwin's claims were time-barred. *Id.* at 41a, 45a. The district court found that Goodwin was challenging the "lingering effect" on her compensation of long-past recall and promotion decisions rather than a "continuing pattern of discriminatory conduct." *Id.* at 34a, 37a.

The Tenth Circuit acknowledged that the "[c]ontinuing effects of prior discrimination are generally not actionable," but nevertheless reversed. Focusing on the pay differential caused by the challenged recall, demotion, and promotion decisions rather than the operative decisions themselves, the court claimed that there is "a crucial distinction [between] discriminatory disparities in pay" and all other types of discrimination. *Id.* at 7a. Relying on one sentence in Justice Brennan's concurring opinion in *Bazemore v. Friday*, 478 U.S. 385, 395 (1986), the court below held that pay discrimination must always "be viewed as a continually recurring series of violations," because "each week's paycheck" is a wrong separately actionable under Title VII. *Id.* at 8a, quoting, in part, *Bazemore*, 478 U.S. at 395-96. The court of appeals concluded that Goodwin's pay discrimination claim was not time-barred, and remanded the case for trial.

3. The Court is presently considering *National Railroad Passenger Corp. v. Morgan*, No. 00-1614, *cert. granted*, 533 U.S. 927 (2001), a case involving the so-called continuing violation theory and its application to discrimination cases under Title VII. In that case, the Chamber has urged the Court to limit the application of the continuing violation theory lest the theory swallow whole the principles of finality, prompt dispute resolution, and repose that are central to the administration of Title VII.

No matter how this Court balances those interests in *Morgan*, however, the dispute at issue in this case will remain. Guidance as to when the continuing violation theory might be applicable will not dispel the notion, reflected in the decision

below and adopted by five other courts of appeals, that compensation cases are fundamentally different from those involving other "tangible employment actions."

Indeed, if the "paycheck" doctrine embraced by the court below is left unaddressed by this Court, the work done by the Court in *Morgan* may go for naught, as plaintiffs gerrymander their claims to fit the special "paycheck" rules currently applicable in six circuits. A writ of certiorari in this case — in combination with a decision in *Morgan* — would do much to resolve the intractable disputes roiling in the lower courts on the application of Title VII's limitations provisions.[2]

SUMMARY OF ARGUMENT

1. After considerable debate, Congress consciously imposed "quite obviously short deadlines" for filing charges of discrimination under Title VII. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). An individual seeking to challenge an allegedly discriminatory employment action must file an EEOC charge within 300 days at the most. An action not promptly challenged becomes "an unfortunate event in history which has no present legal consequences." *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

2. The rule applied below — that every alleged wrong with an impact on an employee's paycheck remains actionable throughout the employee's tenure — eviscerates the deliberate policy choices made by Congress in crafting a statute of limitations for Title VII claims. That rule would allow an employee to challenge actions occurring years and even decades earlier, forcing employers to defend the conduct of supervisors

2. A ruling in this case could also affect cases brought under other federal discrimination statutes such as 42 U.S.C. § 1981, the Age Discrimination in Employment Act, and the Equal Pay Act . The lower federal courts have typically applied the Court's Title VII precedents in these contexts. *See, e.g., Crawford v. Western Elec. Co.*, 614 F.2d 1300 (5th Cir. 1980) (class action under Title VII and § 1981); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 345 n.19 (4th Cir. 1994).

long-since retired or dead, and involving records that have long since been discarded.

3. The decision below exacerbates and intensifies a mature and intractable circuit split on this vital issue that affects nearly every employment discrimination claim. The Court has previously acknowledged that when there is intra-circuit "conflict, confusion, and uncertainty concerning" the limitations rules applicable to civil rights cases, "compelling reasons [exist] for granting certiorari." *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Moreover, if the decision below is allowed to stand, any accommodation of competing interests the Court might reach in *National Railroad Passenger Corporation v. Morgan*, No. 00-1614, concerning the continuing violation doctrine, would be advisory only, as a plaintiff could always characterize his or her claim as a pay disparity, and thereby challenge any employment action during his or her entire tenure.

4. The court of appeals supposed that its decision was compelled by *Bazemore v. Friday*, 478 U.S. 385 (1986). Nothing in *Bazemore* requires, or even recommends, the result reached below. In *Evans v. United Airlines*, 431 U.S. 553 (1977), and again in *Bazemore v. Friday*, the Court held that a complainant must file a charge of discrimination promptly following the occurrence of the unlawful act or practice the complainant seeks to challenge, and cannot base a valid claim solely on the continuing impact of a statutory violation occurring outside the limitations period.

Bazemore also held that an employer could not defend a facially discriminatory pay structure — one that *currently* discriminates — by arguing that it had engaged in the same discriminatory conduct outside the limitations period without complaint. In the context of such a facially discriminatory system, the Court observed that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 395-96. As the Court has subsequently noted, this

rule is limited to *currently operating*, facially discriminatory systems. No such system was alleged in this case.

Nonetheless, the court below, and at least six other courts of appeals, have read this one sentence in *Bazemore* to eliminate any meaningful statute of repose in Title VII cases involving compensation. Four other courts of appeals have harmonized *Evans* and *Bazemore* in a way that effectuates the plain language of the statute, gives complainants a mechanism for vindicating their civil rights, and underscores the importance of repose inherent in every statute of limitations. This division of authority will persist until this Court resolves it.

2. The courts of appeals are also sharply divided as to how far back in time a district court may extend an award of back pay. Some courts have held that the district court's remedial authority extends no further than the beginning of the charge-filing limitations period (either 180 or 300 days, depending on the jurisdiction)[3]; others have held that the court can award back pay for a two-year period prior to the date on which the charge was filed, although some make the extended period available only with proof of a continuing violation. This is a significant issue that arises in almost every case in which a plaintiff is entitled to back pay, and can more than double a plaintiff's back pay award. A clear rule is needed to prevent forum-shopping and to ensure that similarly situated plaintiffs recover comparable awards.

REASONS FOR GRANTING THE WRIT

I. THE RULE ESTABLISHED BY THE COURTS OF APPEALS ELIMINATES ANY MEANINGFUL LIMITATIONS PERIOD IN TITLE VII CASES, IS IRRECONCILABLE WITH THIS COURT'S OPINIONS, AND DEEPENS A DIVISION OF AUTHORITY AMONG THE COURTS OF APPEALS.

"By choosing what are quite obviously short deadlines [for filing charges of discrimination under Title VII], Congress clearly intended to encourage the prompt processing of all

3. 42 U.S.C. § 2000e-5(e)(1).

charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). The rule adopted by the court below ignores this compelling societal interest and eviscerates Congress' conscious design. The court felt compelled to reach this result by a single sentence in *Bazemore*, but nothing in that decision suggests that a complainant is entitled to lie in wait for years — even decades — before forcing an employer to justify a discrete employment decision rendered by managers who may well have quit, retired or died in the interim. The decision below is fundamentally at odds with the notions of repose on which administration of the Act depends.

A. Congress Adopted Title VII's Charge-Filing Limitations Period to Achieve a Careful Balancing of Employer and Employee Rights.

Statutes of repose serve compelling societal interests. They "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Thus, a limitations period "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Delaware State College v. Ricks*, 449 U.S. 250, 259-60 (1980) (internal quotes omitted), quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975).

By definition, every limitation period expresses society's interests in repose,[4] but those interests are particularly compelling in the employment setting. Unlike litigants in the great run of civil cases — who often are strangers or parties to one-time or episodic commercial agreements — the relationship between employers and employees is of central and continuing

4. *See, e.g., Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (rejecting rule that "conflicts with a basic objective — repose — that underlies limitations periods"); *Wilson*, 471 U.S. at 271 ("application of any statute of limitations would promote repose").

importance to both. Even employment decisions that appear on their face to affect only a single employee usually have an impact on many others; when one employee receives a promotion or is allocated the top merit pay increase in her department, that opportunity, or those dollars, cannot not go elsewhere. *Cf. US Airways v. Barnett*, __ U.S. __, No. 00-1250, 2002 U.S. LEXIS 3034 (April 29, 2002). When an employer makes these allocation decisions, then, everyone involved has an interest in settling promptly any challenges to them.

Moreover, to defeat a claim of discrimination, an employer must be able to articulate — convincingly — its rationale for the challenged decision, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Hicks v. St. Mary's Honor Ctr.*, 509 U.S. 502, 506-07, 513-14 (1993), but the employer's ability to muster a defense dissipates sharply as time passes. Memories fade; managers quit, retire or die; records are lost or destroyed to make way for still other records.[5] Business units are reorganized, disassembled, or sold; tasks are centralized, dispersed, or terminated altogether.

Unless an employer receives prompt notice that it will be called upon to defend a specific decision, it will have no "opportunity to gather and preserve the evidence with which to sustain himself. . . ." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 372 (1977) (quoting Congressman Erlenborn, 117 Cong. Rec. 31972 (1971)). By compelling those injured to raise their claims promptly, Title VII's limitations period "protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57. Thus, "[e]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation. . . . [T]he right to be free of stale claims in time comes

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5. The EEOC has said that, in most instances, an employer is not obligated to keep personnel records for more than one year, tacitly acknowledging that employers should not be called to account for older decisions. *See* 29 C.F.R. § 1602.14 (requiring employers to keep most employment records for one year).

to prevail over the right to prosecute them." *American Pipe & Constr. Co.*, 414 U.S. at 554. In short, only a meaningful rule of limitations makes it possible for an employer to articulate the rationale of its managers for a discrete employment decision, and only with such a rationale in hand can it hope to defend against even the most baseless charge of discrimination. *Wilson*, 471 U.S. at 271 ("[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost").[6]

And that, of course, is precisely why Congress purposefully selected a short charge-filing limitations period (either 180 or 300 days).[7] *See, e.g., Mohasco Corp.*, 447 U.S. at 825 ("Congress clearly intended to encourage the prompt processing of all charges of employment discrimination"); *Occidental Life Ins. Co.*, 432 U.S. at 372 (1977) (Congress enacted Title VII's limitations period "to protect fully the rights of the person or persons against whom the charge is filed") (quoting S. Rep. No. 92-415, p. 25 (1971)).

B. The Decision Of The Court Of Appeals Effectively Undermines The Societal Interest In Repose.

The rule adopted by the court of appeals cannot be reconciled with these principles. The court below concluded that a complainant could lawfully challenge a discrete employment decision years or decades after the fact, so long as the economic consequences of that decision persist into the limitation period. That rule is incompatible with Congress' design and the notions of "essential fairness to defendants" that underlie all statutes of repose. *American Pipe & Constr. Co.*, 414 U.S. at 554.

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6. The case for definitive and unambiguous rules of limitation is at its strongest with "a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Mohasco Corp.*, 447 U.S. at 816 n.19 (citation omitted).

7. 42 U.S.C. § 2000e-5(e); *cf.* 29 U.S.C. § 160(b) (providing for six-month limitations period for filing unfair labor practice charge).

Goodwin's complaint sought to force GM to defend the merits of employment decisions it made up to *eighteen years* before she filed her charge. Pet. App. at 29a, 32a. She complained, for example, that when she was recalled from a layoff in 1993, she had been placed improperly in petitioner's salary grid. She protested her placement to two of petitioner's managers at the time she was "wrongfully" slotted, but she did not file her charge of discrimination until as much as *six years later.*[8] By now, however, one of the managers to whom she claims to have complained is dead and the other is retired. Pet. Br. at 7 n.1. "Preserving a right of action for such a vast stretch of time would . . . thwart[] the basic objective of repose underlying the very notion of a limitations period." *Rotella v. Wood*, 528 U.S. 549, 554 (2000).

According to the court of appeals, the rule it articulated is applicable only to "pay discrimination" cases; for every other mode of discrimination, complainants are obligated to act with dispatch. The text of Title VII makes no such distinction, and as explained *infra* at pp. 12-14, neither do the Court's opinions.

But more fundamentally, experience teaches that the distinction between "pay" cases on the one hand, and "everything else" on the other, is an illusion. A discrimination case typically begins with a demonstration that the plaintiff has suffered a "tangible employment action"; for an employer's conduct to constitute tangible employment action, there must be "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). Thus, nearly every discrimination case will involve a decision with a demonstrable impact on compensation. Any "exception" to the ordinary rules of repose that would permit a plaintiff to challenge adverse "employment actions" that are decades old, based on a continuing impact on pay, would push the general

8. Goodwin claimed to be uncertain as to precisely when the conversation occurred.

rule of repose to the margins of the statute, where it would come into play only with respect to the claims of exceptionally inartful plaintiffs.

This is not mere prediction. In *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995), for example, the Sixth Circuit — following the approach adopted by the Tenth Circuit below — held that the plaintiffs filed their charge too late to challenge their assignment to non-union jobs, but nonetheless were entitled to challenge the pay disparity resulting from that allegedly discriminatory assignment. Similarly, in *Nealon v. Stone*, 958 F.2d 584, 591-92 (4th Cir. 1992),[9] the court followed this same rationale to conclude that the plaintiff could challenge a job classification decision made well outside the limitations period because that classification decision had ongoing economic consequences, reflected in "each paycheck" the plaintiff received.

Indeed, in *Evans*, the Court noted that in the limitations arena, clever characterization could easily overcome reasoned rules of law. There, the plaintiff sought to challenge the current *consequences* of a decision made long ago — a decision that deprived her of seniority, and thus compensation, within the limitations period. The Court concluded that

> the mere fact that a past event . . . has affected the calculation of seniority credit [and thus the plaintiff's present paycheck, does not give the plaintiff a timely charge], even if the past event might at one time have justified a valid claim against the employer. *A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations.*

Evans, 431 U.S. at 560 (emphasis added).

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9. *Nealon* was an Equal Pay Act case, but it purported to apply this Court's Title VII limitations decisions.

C. The Courts Of Appeals Are In Disarray On The Application Of Title VII's Limitations Period, Especially In Cases Characterized As "Pay" Or "Compensation" Cases.

The courts of appeals are divided into two "camps" in applying Title VII's limitations period to claims characterized as "pay" or "compensation" disputes, however ill-defined that category might be. These are not merely academic differences in analytical approach; in four circuits, Congress's charge-filing limitations period is enforced with some degree of rigor (properly, in the Chamber's view). In six other circuits, there effectively *is* no limitations period in most "compensation" cases. In these circuits, an aggrieved employee may, if he chooses, file a charge within the statutory period following the relevant adverse employment action he challenges, or he may wait until he or she retires — years or decades later — without any adverse consequences for the timeliness of the claim.

This remarkable divergence can be attributed to a single passage — indeed, to a single sentence — in *Bazemore v. Friday*, 478 U.S. at 395-96.[10] Heedless of the Court's admonition that it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Ctr.*, 509 U.S. at 515, six courts of appeals have drawn from this language in *Bazemore* an exception, not merely to the Court's other Title VII cases, but to the Court's more general conviction that excessive lenity in matters of timeliness "would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability." *Rotella*, 528 U.S. at 559 (a period of limitations stretching eight years would defeat interest in repose). That result is neither compelled nor even permitted by the Court's cases, as explained below.

10. The Court entered a brief *per curiam* opinion in *Bazemore*, which indicated general agreement with the accompanying concurring opinion of Justice Brennan, in which the other Justices joined. All of the language cited in this brief and relied upon by the court below appears in Justice Brennan's concurring opinion.

1. The Court's Cases Reflect A Unified Standard To Limitations Questions Under Title VII.

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), *Bazemore*'s precursor, establishes the prevailing Title VII limitations rule: "a discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed [even if that act has] a continuing impact on [the charging party's] pay and fringe benefits. . . . [M]ere continuity" of impact is not enough to turn a stale claim into a timely one. *Evans*, 431 U.S. at 558. *Bazemore* applied that rule to a facially discriminatory salary system, as explained below.

a. Evans was a flight attendant. When she married, the airline's policies forced her to quit. When the no-marriage rule was subsequently eliminated, she returned to work, but the airline refused to give her seniority credit for the duration of her compelled absence. When she sued the airline, she did *not* seek back pay for the period predating her return but, because her seniority determined her pay rate, and it had been depressed by the airline's prior discrimination, she sought compensation for the shortfall in her *current* paychecks.

The Court held, however, that Evan's ongoing economic disadvantage was merely a lingering consequence of a statutory violation occurring outside the limitations period, and thus was time-barred. "United was entitled to treat that past act [*i.e.* Evan's termination] as lawful after respondent failed to file a charge of discrimination" within the statutorily prescribed period. *Id.* at 558. Although Evans claimed that a *current* violation existed, because each paycheck she received contained less money than she would have received had her seniority been adjusted to remedy the prior discrimination, the Court rejected Evan's focus on her current paycheck. Nearly every claim has a financial component, the Court observed, and the rule urged by Evans "would substitute a claim for seniority credit for almost every claim which is barred by limitations." *Id.* at 560.

b. *Bazemore* involved an overtly discriminatory pay policy established before the employer, a state agency, was subject to Title VII. 478 U.S. at 390-91. Although the agency eliminated the race-specific categories that had characterized the system once it became subject to the Act in 1972, the discriminatory pay policy continued thereafter. *Id.* at 391.

The court of appeals held that the employees' discrimination claims were time-barred, but this Court reversed. *Id.* at 386-88. An employer, the Court held, could not defend a *current* facially discriminatory pay structure by arguing that it had previously engaged in the same discriminatory conduct without complaint. "[T]o the extent an employer continue[s] to engage in [a discriminatory] act or practice [within the limitations period], it is liable" under Title VII. *Id.* at 394-96. It was in this context that Justice Brennan observed that "[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

c. Twice, the Court has explained the relationship between *Evans* and *Bazemore*. *Bazemore* itself explained the critical distinction: the employer in *Bazemore* had continued to impose, within the limitations period, a facially unlawful pay system intended to perpetuate a discriminatory regime begun before the Act applied to it. In contrast, the "Respondent [in *Evans*] made no allegation that the seniority system itself was intentionally designed to discriminate." *Bazmore*, 478 U.S. at 396 n.6. The Court thus drew a distinct line between "system[s] intentionally designed to discriminate," which can be challenged every time the system effects a discriminatory result, and discrete, non-systemic employment decisions, which must be challenged at the time they occur.

Similarly, in *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989), a case challenging an allegedly discriminatory seniority system, the Court explained that with:

> a facially neutral system, the discriminatory act occurs *only* at the time of adoption. . . . [Conversely,] a facially

> discriminatory system [like the pay structure at issue in *Bazemore*] by definition discriminates every time it is applied. This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks* — which focuses on the timing of the *discriminatory* act for purposes of the statute of limitations. It . . . also [explains the "each week's paycheck" language] of *Bazemore v. Friday*. . . .[11]

Id. at 912 n.5 (emphasis in original). *Lorance* thus underscored the ingredient essential to the *Bazemore* holding: a "facially discriminatory system" operating within the limitations period.

2. The Courts of Appeals' Divergent Interpretations of Bazemore Have Created Inconsistent Rules Governing the Application of Title VII's Limitations Periods to Pay-Related Discrimination Claims.

Like the *Lorance* Court, the Sixth, Seventh, D.C. and Federal Circuits have all found in *Bazemore* a special application of the general rule of limitations, applicable to cases involving "facially discriminatory system[s]." *Lorance*, 490 U.S. at 912 n.5. In these courts, the "critical question" is not the type of employment benefit affected by the alleged discrimination — pay, promotion, discharge, etc. — but "whether any present violation exists." *Evans*, 431 U.S. at 558. The Second, Third, Fourth, Eighth, Tenth and Eleventh Circuits, conversely, read *Bazemore* as establishing a unique rule of limitations in cases involving pay discrimination. These conflicting interpretations

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11. *Lorance's* application to seniority systems was superseded by the Civil Rights Act of 1991, but the statute left the *Evans* limitations rule unaffected outside of the seniority system context. *See, e.g.*, 137 Cong. Rec. S15485 (1991) (interpretive memorandum of Sen. Danforth ("[t]his legislation should not be interpreted to affect the sound rulings of the Supreme Court regarding 'continuing violations' theory under Title VII").

of the Court's decisions will not be reconciled unless and until the Court determines which is correct.

a. The "Present Violation" Approach.

Dasgupta v. University of Wis. Bd. of Regents, 121 F.3d 1138 (7th Cir. 1997), is typical of the circuit opinions adopting the "present violation" approach to *Bazemore* and *Evans*. In *Dasgupta*, a professor alleged pay discrimination stemming from decisions made over two decades, but *during the limitations period* he had received raises that were comparable to those received by his peers. Writing for the court, Judge Posner found *Bazemore* inapplicable because in *Bazemore* "the illegal act [was] repeated during the limitations period," while in *Dasgupta*, the plaintiff sought simply to "rectify the [economic] consequences of time-barred" pay decisions. *Id.* at 1140. A contrary ruling, the court explained, would "unravel the statute of limitations." *Id.*

The Seventh Circuit has reaffirmed this "present violation" approach in two subsequent cases. *See Snider v. Belvidere Township*, 216 F.3d 616, 618 (7th Cir. 2000) ("the continued receipt of lower paychecks does not revive past allegedly discriminatory conduct"); *Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 915 (7th Cir. 1999) (claim that denial of skills-based pay breached collective bargaining agreement was time-barred; ongoing pay effect stemmed from decision six years earlier and was not actionable). A number of other federal courts of appeals — including those in the Sixth, D.C., and Federal Circuits — have adopted a similar analysis in the context of pay-related discrimination claims. *See, e.g., Anderson v. Zubieta*, 180 F.3d 329, 337 (D.C. Cir. 1999) (reversing summary judgment for employer; where plaintiffs offered evidence that pay disparities were "caused by the continued maintenance of a broadly discriminatory pay and benefits system," new violations occurred during limitations period); *Bosley v. Merit Sys. Protection Bd.*, 162 F.3d 665, 667 (Fed. Cir. 1998) (claim based on denial of pay increase was time-barred even though monetary effects continued into the future); *EEOC v. Penton Indus. Publ'g*

Co., 851 F.2d 835, 838 (6th Cir. 1988) (dismissing pay disparity claim; claim challenged isolated employment decision outside limitations period rather than long-standing and demonstrable policy of discrimination).[12]

b. The "Paycheck" Approach.

The court below expressly rejected the "present violation" approach urged by Judge Posner in *Dasgupta*, and, based on its reading of the "paycheck" language from *Bazemore*, held that a plaintiff need not act within the time limits prescribed by Section 706(e) to challenge a discrete compensation-related decision. Indeed, the court drew from *Bazemore* a rule that would entitle an employee to wait until the end of his or her career before challenging such a decision.

The Second, Third, Fourth, Eighth and Eleventh Circuits have adopted the same rule. Most of these courts have described these ongoing wage disparities as a continuing violation. *See Cardenas v. Massey*, 269 F.3d 251, 257-58 (3d Cir. 2001) (discriminatory wage payments constitute a continuing violation); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 167-68 (8th Cir. 1995) (gender discrimination claim regarding assignment of plaintiff to non-union job was time-barred, but resulting pay disparity was still actionable seven years later, based on *Bazemore*'s "paycheck" language); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347-48 (4th Cir. 1994) ("an act of sex discrimination in compensation first inflicted at the date of hiring can thereafter continually violate the plaintiff's rights" due to ongoing pay disparity, even when hiring decision occurred outside limitations period);

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12. *See also Tademe v. St. Cloud State Univ.*, 2001 U.S. Dist. LEXIS 20666, at *14 (D. Minn. Dec. 10, 2001) (plaintiff's claim challenging the ongoing economic consequences of a 1991 hiring placement decision were time-barred; decision was "not a repeated and on-going decision" by the employer and the resulting lower paychecks do not constitute new violations); *Williams v. Munoz*, 106 F. Supp. 2d 40, 42-43 (D.D.C. 2000) (failure to promote claim was time-barred even though current paychecks were lower as a result).

Calloway v. Partners Nat'l Health Plans, 986 F.2d 446, 449 (11th Cir. 1993) (reversing district court's finding that hiring decision that caused pay disparity was discrete act rather than continuing violation; "[w]hen the claim is one for discriminatory wages, the violation exists every single day the employee works"); *Nealon v. Stone*, 958 F.2d 584, 591-92 (4th Cir. 1992) (plaintiff could challenge employer's job classification decision even though it occurred outside the limitations period, because of ongoing pay disparity; relying on *Bazemore*'s "paycheck" language).[13]

The Second Circuit has reached a similar conclusion, relying on the *Bazemore* "paycheck" language, but has concluded that wage disparities represent a series of discrete violations rather than a continuing violation. *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (pay discrimination "is fundamentally unlike" other types of discrimination; quoting *Bazemore*'s "paycheck" language).

The rule adopted by these courts "would permit plaintiffs who know of a [violation] to wait, 'sleeping on their rights,' as the . . . damages accumulate, perhaps bringing suit long after the 'memories of witnesses have faded or evidence is lost.' " *Klehr*, 521 U.S. at 187. If, as this Court has observed, "Congress clearly intended to encourage the prompt processing of all charges of employment discrimination," that rule of law cannot stand. *Mohasco Corp.*, 447 U.S. at 825. The Court should grant review in this case to eliminate this division of authority and correct the court of appeals' misguided application of federal law.

13. The Eleventh Circuit has concluded that this "paycheck" approach should be limited to wage disparities, and does not extend to disparities in stock dividends. *Carter v. West Publ'g. Co.*, 225 F.3d 1258, 1264-65 (11th Cir. 2000) (disparities in stock dividends constituted "present effects of a one-time violation," because they derived solely from the employer's previous decision as to who could participate in stock program, and the program ended two years before a charge was filed). The Eleventh Circuit's hairsplitting on which types of compensation should be covered by the "paycheck" exception underscores that this reading of *Bazemore* is unworkable.

II. THE COURT SHOULD ALSO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE CALCULATION OF TITLE VII BACK PAY AWARDS.

Section 2000e-5(g) of Title VII provides that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission," but does not specifically provide for when, or whether, a court may award back pay for a period greater than 180 or 300 days, the filing period for charges of discrimination under Title VII. The circuit courts have produced at least three interpretations of how Section 2000e-5(g) should be applied.

Some courts have held that back pay is recoverable only for a period beginning with the charge-filing limitations period.[14] Other courts have held that back pay may be recovered for two years in every Title VII case, regardless of whether a continuing violation is shown[15]; and a third group allows successful

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14. In *Ashley v. Boyle's Famous Corned Beef Co.*, the *en banc* Eighth Circuit found a plaintiff's discriminatory pay claim to be timely, based on the continuing violation theory, but nevertheless limited recovery to the 300-day charge-filing limitations period applicable to Title VII claims in Missouri. 66 F.3d at 168. *See also Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 n.3 (8th Cir. 2001); *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997) (citing *Ashley* with approval); *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 800 (11th Cir. 1992) (even where a continuing violation exists, plaintiff may recover only for 180-day filing period); *Blake-McIntosh v. Cadbury Beverages, Inc.*, No. 3:96-CV-2554 (EBB), 1999 WL 643661, at *8 (D. Conn. Aug. 10, 1999) (disallowing recovery of back pay beyond 300-day filing period).

15. *See, e.g., EEOC v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 880 (7th Cir. 1994) (district court "properly limited recovery [of back pay] in accordance with the two year limitation of Title VII"), *cert. denied*, 513 U.S. 1198 (1995); *Estate of Pitre v. Western Elec. Co.*, 975 F.2d 700, 705-06 (10th Cir. 1992), *cert. denied*, 510 U.S. 972 (1993); *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1376 (S.D. Fla. 1998), *vacated on other grounds*, 220 F.3d 1263 (11th Cir. 2000); *Bempah v. Kroger Co.*, No. CV488-200, 1989 U.S. Dist. LEXIS 6345 (S.D. Ga. June 5, 1989).

plaintiffs to recover back pay measured by this two year window only where there is a continuing violation.[16]

For all of the reasons given in GM's petition, the Chamber believes that the Court should grant review on this issue as well. In addition, the Chamber notes that it is inherently unsatisfactory to have the nation's primary anti-discrimination statute administered in such a fundamentally inconsistent fashion based solely on geography. Most of the individual businesses that belong to the Chamber do business in more than one state, and a great many do business in all or nearly all of them. Widely disparate rules on questions of fundamental importance, like the remedial reach question posed here, merely invite forum shopping. Only the Court can harmonize the law on this point, and the Chamber submits it should do so in this case.

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16. *See, e.g., Sabree v. United Bhd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 401 & n.11 (1st Cir. 1990); *Stallworth v. Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560 & n.4 (5th Cir. 1985); *Acha v. Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *Eisenberg v. Pennsylvania State Univ.*, No. 3:00CV301, 2001 WL 202095, at *7 (M.D. Pa. Feb. 28, 2001) (citing *Garland v. USAir, Inc.*, 767 F. Supp. 715, 727 (W.D. Pa. 1991)).

CONCLUSION

The petition should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

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